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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SEATTLE TIMES COMPANY,

Employer,

and

PACIFIC NORTHWEST NEWSPAPER
GUILD, COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 37082,

Petitioner.

No. 19-RC-261015

SEATTLE TIMES COMPANY'S
REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF
ELECTION

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I. INTRODUCTION

Pursuant to § 102.67 of the National Labor Relations Board’s (“Board” or “NLRB”) Rules and Regulations, The Seattle Times Company (“The Times”) requests that the Board review and reverse the Regional Director’s (“RD”) Decision and Direction of Election (“DD&E”) and dismiss this representation petition (“RC Petition”).¹ As will be shown below, the DD&E fails to hold the Petitioner to its express promise not to represent the petitioned-for employees. The DD&E’s conclusion is contrary to traditional contract interpretation principles and contrary to undisputed bargaining history.

In particular, the DD&E’s departure from officially reported Board precedent—namely *Briggs Indiana Corp.*, 63 NLRB 1270 (1945), and progeny—which holds unions to their contractual agreements not to represent certain categories of employees—raises a substantial question of law. *See* 29 C.F.R. § 102.67(d)(1)(ii). Second, the RD’s decision on a factual issue—his interpretation of Addendum 12 to the Parties’ collective bargaining agreement (“CBA”), the New Media Agreement (“NMA” or “Agreement”)—is clearly erroneous on the record, and this error prejudicially affects The Times’ rights. *See* 29 C.F.R. § 102.67(d)(2).² And third, the conduct of the Hearing Officer in refusing to admit The Times’ evidence and the RD’s subsequent affirmation of that ruling have resulted in prejudicial error to The Times. *See* 29 C.F.R. § 102.67(d)(3). In a separate contemporaneous motion, The Times moves to impound the ballots in the directed mail-ballot election.

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II. PROCEDURAL HISTORY

On May 29, 2020, the Petitioner, Pacific Northwest Newspaper Guild (the “Guild”), filed a representation petition (“RC Petition”) in the above-captioned matter seeking to represent “Digital Journalists” at The Times. The RC Petition also requests an *Armour-Globe* self-

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¹ The Times proceeds under the representation case procedures found in the Rules and Regulations promulgated by the Board in 2014 (the “Old Rules”) rather than those announced in 2019 (the “New Rules”). The instant RC Petition was filed with Region 19 on May 29, 2020, yet the New Rules “are applicable to all petitions filed on or after May 31, 2020.” *See* Memorandum GC 20-07 (June 1, 2020).

² The Times and the Guild will be referred to collectively herein as the “Parties.”

1 determination election³ in which the proposed voting unit of Digital Journalists would be joined
2 to an existing bargaining unit at The Times that includes Print Journalists (the “Main Bargaining
3 Unit”).⁴ On May 31, 2020, The Times filed an unfair labor practice charge (“ULP”) concerning
4 the Guild’s repudiation of the NMA.⁵ On June 1, 2020, The Times requested that the processing
5 of the RC Petition be blocked pending resolution of the ULP matter. On June 4, 2020, the RD
6 ordered the Parties to show cause why the RC Case should proceed to a hearing or, in contrast,
7 be dismissed absent withdrawal or otherwise disposed of. The Times responded to the Notice to
8 Show Cause on June 15, 2020. On July 1, 2020, the Region decided to hold the ULP Case in
9 abeyance, deny The Times’ Request to Block the RC Petition and set the RC Case for hearing.
10 The Region held a virtual hearing in the RC Case on July 16 and 17, 2020, and the Parties filed
11 post-hearing briefs on July 24, 2020. *See* Tr. 366:13-25.⁶ In his DD&E issued on August 20,
12 2020, the RD held that that the NMA does not bar the Guild’s RC Petition and directed a mail-
13 ballot election to commence on August 27, 2020. DD&E 5-6, 24-28.⁷

14 The Times now requests review of the Regional Director’s decision that the Petition
15 should not be dismissed under 29 C.F.R. § 102.67(d).⁸

16
17 ³ *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

18 ⁴ The Guild’s RC Petition sought to represent:

19 All full-time and regular part-time digital newsroom employees [at The Times]. NOTE: Petitioner seeks
20 an “Armour Globe” election to place these newly represented employees within the existing Petitioner-
21 represented bargaining unit.

22 The RD refers to The Times’ Digital Journalists as “digital news employees” or “petitioned-for employees.”
23 *See* DD&E 1. The Times refers to these employees as Digital Journalists for consistency across its pleadings.
24 The terms are all synonymous.

25 ⁵ Case No. 19-CB-261080.

26 The essence of the ULP charge is that the Guild has agreed, via the express terms of the NMA, not to attempt to
27 represent the Digital Journalists, and that its current efforts attempting to represent these employees constitute a
28 repudiation and unilateral modification of the Parties’ NMA in violation of Sections 8(b)(3) and 8(d) of the National
29 Labor Relations Act (“NLRA” or “Act”). *See* 29 U.S.C. §§ 158(b)(3), 158(d).

30 ⁶ This Request for Review relies on the exhibits and transcript from the RC Case hearing. The Employer Exhibits
31 are referred to as “ER Exh.”; Union Exhibits are referred to as “U Exh.”; the transcript is referred to as
32 “Tr.” followed by the relevant page and line number(s); and the RD’s DD&E is referred to as “DD&E” followed by
33 the relevant page number(s). The exhibits and transcript excerpts referenced herein will be filed concurrently with
34 this Request for Review.

35 ⁷ The RD issued an amendment to the DD&E on August 25, 2020, replacing the section entitled “Right to Request
36 Review,” which had erroneously advised the Parties they could request review consistent with the New Rules.

37 ⁸ At the hearing, The Times challenged whether, if the petition was not dismissed, an *Armour-Globe* election was
38 appropriate. The Times does not seek review of the RD’s decision that an *Armour-Globe* election is appropriate.

1 **III. STATEMENT OF FACTS**

2 The Times is the leading provider of print and digital news content in the Pacific
3 Northwest. It publishes a daily newspaper that is distributed in the Puget Sound area and also
4 publishes news content electronically (“digitally”), both at www.seattletimes.com and through
5 other channels, including email newsletters, alerts and posts on social media platforms, including
6 Facebook, Twitter, and Instagram, live-streaming events on those social media platforms, and
7 podcasts. *See* Tr. 102:23-103:1, 103:8-10.

8 The Guild has represented a bargaining unit of employees at The Times for over 50 years
9 (the “Main Bargaining Unit”). DD&E 2.⁹ Throughout that time, the Guild and The Times have
10 entered into a series of CBAs. The current CBA was reached in 2019 and expires in 2023.
11 ER Exh. 1. The Main Bargaining Unit includes employees in the News Department who work
12 on The Times’ printed newspaper, with the titles of: Reporters, News Page Designers, Multi-
13 Media Production Technicians, Desk Editors, and News Assistants. U Exh. 1. The News
14 Department also contains “Digital Journalists”—those who provide content for The Times’
15 electronic publications. The Digital Journalists work in the following positions: News
16 Producers, Engagement Editors, and Video Journalists.¹⁰ *See* ER Exh. 14, 15, 16.¹¹ Digital
17 Journalists are not included in the Main Bargaining Unit and are unrepresented. *See* Tr. 45:23-
18 25. The Times and the Guild refer to unrepresented employees as “unaffiliated.”

19 The Parties’ CBA contains, as Addendum 12, an NMA concerning The Times’ digital
20 platforms, which have always been outside the scope of the Main Bargaining Unit. The history
21 of the NMA is obvious and undisputed. Both Parties were aware that digital media products
22 would likely see more growth than the print product. Facing potential decline, the Guild wanted
23 its members in the Main Bargaining Unit to have the opportunity to work in digital media. *Id.* at
24

25 ⁹ Prior to 2019, the Guild represented a second bargaining unit for Composing Room employees. In 2019, the Guild
and The Times agreed to merge the Composing Room Unit and the Main Bargaining Unit. *See* Tr. 35:3-15.

26 ¹⁰ As reflected in ER Exh. 3, p. 5 (Unit as Proposed in Petition), the Digital Journalists are all categorized as either
Website Producers or Video Editors. They are referred to as News Producers, Engagement Editors, and Video
27 Journalists as secondary titles. *See, e.g.*, Tr. 95.

¹¹ Page 1 of ER Exh. 15 was withdrawn during the Hearing. *See* Tr. 119:5-7.

1 51:22-23; ER Exh. 18 (¶ 6).¹² Likewise, The Times wanted the flexibility to assign non-unit
2 digital employees to do print work. *Id.* at 324:15-18. Both Parties did not want these changing
3 dynamics to alter the Guild’s representation. Thus, per the 2001 NMA, The Times agreed that it
4 could assign Main Bargaining Unit employees to digital products. ER Exh. 2, p. 65 (¶ A).
5 At the same time, the Guild agreed that The Times can assign unaffiliated Digital Journalists to
6 work in the “Guild Represented Department[s],” as long as they did not perform bargaining unit
7 work. ER Exh. 2 p. 65 (¶ B). The Guild also agreed that it would “not use this Agreement, work
8 assignments, or products resulting from this Agreement as a means to attempt to represent or
9 claim jurisdiction over any unaffiliated employee(s) from a non-Guild home department through
10 accretion, unit clarification procedures or contract grievance procedures.” ER Exh. 2,
11 p. 65 (¶ D).

12 In 2013, the Parties modified the NMA in a few ways. First, the wording was changed so
13 that it did not rely on the concept of “departments,” since the organizational structure of the
14 Newsroom had changed since 2001. Tr. 39:8-40:4; ER Exh. 8 (¶¶ A, B, D).

15 Second, the Guild agreed that unaffiliated Digital Journalists could perform bargaining
16 unit work, but strictly limited in amount. Tr. 325:4-21; ER Exh. 8 (¶ B). Specifically, the total
17 number of Digital Journalists eligible to regularly perform print-based work cannot exceed ten
18 percent of the total Guild-represented News Department staff, and individual Digital Journalists’
19 workload cannot be comprised of more than fifty percent of their work each month. *Id.*
20 If Digital Journalists exceed the ten-percent ratio in the print space, those Journalists in excess of
21 the ratio may contribute content to The Times’ print product “on an occasional and irregular
22 basis” not to exceed two percent of The Times’ print content in a given month. *Id. See also*
23 Tr. 325:9-21.

24 Third, the Parties modified Paragraph D to cabin the NMA’s limitations to the term of the
25 Agreement. *See* ER Exh. 8, p. 2 (¶ D). Thus, Paragraph D states in full:

26 ¹² ER Exh. 18—Christopher Biencourt’s declaration submitted in response to the Notice to Show Cause in this
27 RC Case—was admitted in lieu of Mr. Biencourt’s testimony because he became unavailable due to a family
emergency. *See* Tr. 236-237.

1 The Parties further agree the Guild will not use this Agreement, work
2 assignments, or products resulting from this Agreement as a means to attempt to
3 represent or claim jurisdiction over any unaffiliated employee(s) from a non-
4 Guild home department or sub-department through accretion, unit clarification
5 procedures or contract grievance procedures. Work assigned or performed
6 pursuant to this cross-jurisdictional Agreement is not intended to enhance or
7 detract from any future accretion, unit clarification or contract grievance
8 argument made by the Guild. Once this Agreement ends, nothing in it shall
9 prevent the Guild from seeking accretion, unit clarification or redress through the
10 contract grievance procedure. Furthermore, nothing in this Agreement is intended
11 to alter the historical practice of the parties with regard to unit work performed by
12 unaffiliated employees in supervisory or executive positions. The Seattle Times
13 recognizes the National Labor Relations Act, Section 7, rights of employees,
14 including those in unaffiliated departments involved with new products and
15 projects within the scope of the Agreement.

16 ER Exh. 1, p. 74 (¶ D).

17 These 2013 changes made clear that the cross-jurisdictional assignments during the NMA
18 could not be used to modify the Guild's bargaining unit even after the NMA expired. The NMA
19 and work assigned thereunder would not be used "to enhance or detract from any future
20 accretion, unit clarification or contract grievance argument made by the Guild." ER Exh. 8, ¶ D.
21 Any efforts to modify the Main Bargaining Unit would start fresh with the situation as of the
22 expiration of the NMA.

23 Fourth, the Parties extended the term of the NMA to be for the current CBA term *and* the
24 term of the next CBA. *See* ER Exh. 8, p. 3. The purpose of this unusual term was to give
25 The Times an opportunity to unwind all the cross-jurisdictional work occurring in the News
26 Department without risk that the Guild would use that work after the end of the NMA to claim
27 jurisdiction over the Digital Journalists through accretion, unit clarification or the Parties'
contract grievance procedure. Tr. 56:12-20, 58:3-5.

These modifications in 2013 did not disturb the existing structure of the Main Bargaining
Unit or change the Guild's jurisdiction. The Guild maintained its promise not to attempt to
represent the Digital Journalists, as well as its separate promise not to claim jurisdiction over
these unaffiliated employees by accretion, unit clarification, or the Parties' contract grievance
procedures. *See* ER Exh. 8, p. 1 (¶ D). Relatedly, the Guild maintained that it would not use the

1 cross-jurisdictional work assignments completed by Print and Digital Journalists in its attempts
2 to represent or claim jurisdiction over the latter employees. *See id.*

3 The NMA and the 2013 modifications are all of a piece. The Times was willing to allow
4 the Main Bargaining Unit journalists to work on its digital products but only as long as it had
5 complete flexibility with respect to those new products. *See* Tr. 67:10-11, 324:15-18. This need
6 for flexibility stems from the fast-paced, ever-changing digital news landscape and is embodied
7 in the terms of the NMA.¹³ In order to ensure flexibility, the NMA requires the Guild to keep
8 “hands off” the Digital Journalists, as articulated in the first sentence of Paragraph D of the
9 NMA as an express prohibition on any attempt to represent the Digital Journalists or to
10 separately claim jurisdiction over them through certain enumerated legal proceedings.
11 ER Exh. 1, p. 74 (¶ D), 18 (¶ 8). *See also* Tr. 38:22-24, 55:17-19. And with the 2013 Term
12 provision, The Times was guaranteed the opportunity to unwind the overlapping work
13 assignments before the Guild’s ability to seek to represent or claim jurisdiction over the Digital
14 Journalists could arise. *See* ER Exh. 8, p. 3. The Parties have renewed the NMA with each
15 successor CBA after 2013, without any modifications. *See* ER Exh. 1, p. 74. Indeed, neither
16 Party proposed any changes to the NMA in the most recent negotiations in 2019.
17 Tr. 308:18-20.¹⁴

18 The Guild honored its promises in the NMA until 2020, when it began organizing Digital
19 Journalists based on the very collaboration authorized by the NMA. This Petition is an
20 outgrowth of that breach of the NMA and is itself prohibited by the NMA.

21 IV. ARGUMENT

22 The Board will grant a Request for Review upon one or more grounds enumerated in its
23 Rules and Regulations. *See* 29 C.F.R. § 102.67(d). There are at least three such grounds for the
24

25 ¹³ For example, as maintained in its preamble, including in the 2013 and current iterations, the NMA states, *inter*
26 *alia*, that the Parties agree there is “a need to develop a significant degree of flexibility in order to create changed
content/products quickly and efficiently, utilizing skills, teams, concepts, and participants who have not historically
worked together.” *See* ER Exh. 1, p. 73 (current NMA); ER Exh. 8 (redline of 2013 NMA); DD&E 2.

27 ¹⁴ Notably, the Guild did not produce any evidence regarding the bargaining and the scope of the Guild’s promise in
the NMA. The Times’ evidence thus stands rebutted.

1 Board to grant review here, and they each justify the Board’s reversing the DD&E and
2 dismissing the instant RC Petition. The first two are considered together with the third analyzed
3 separately thereafter.

4 **A. The RD Departed from Board Precedent by Directing an Election, and His**
5 **Erroneous Interpretation of the NMA Is Prejudicial to The Times’ Rights**

6 The Times’ Request for Review raises a substantial question of law because of the RD’s
7 departure from officially reported Board precedent—namely *Briggs Indiana*, 63 NLRB 1270
8 (1945), and progeny—which holds unions to their bargained-for agreements not to represent
9 certain employees. *See* 29 C.F.R. § 102.67(d)(1)(ii). Relatedly, the RD erroneously interprets
10 the actual terms of the NMA. *See* 29 C.F.R. § 102.67(d)(2).

11 Although the RD identified the correct precedent applicable to this case, the DD&E’s
12 cursory analysis of the NMA is contrary to normal contract interpretation principles and cannot
13 stand. *See* DD&E 3-4, 5-6. Here, the Guild agreed in the NMA that it “will not use this
14 Agreement, work assignments, or products resulting from this Agreement as a means *to attempt*
15 *to represent* or claim jurisdiction over any unaffiliated employee(s) from a non-Guild home
16 department or sub-department through accretion, unit clarification procedures or contract
17 grievance procedures.” *See* ER Exh. 1, p. 74 (¶ D) (emphasis added). The Board should find
18 that these words are a clear and express promise not to “attempt to represent” the Digital
19 Journalists, including through the petitioned-for election. Accordingly, the Board should reverse
20 the DD&E and dismiss the RC Petition.

21 **1. The RD Improperly Disregarded the Guild’s Express Promise Not to**
22 **Attempt to Represent the Digital Journalists**

23 The Board has long held that a promise not to represent employees is enforceable and
24 requires dismissal of a representation petition. In *Briggs Indiana Corp., supra*, the Board
25 recognized that a union can contractually restrict itself from representing a specific group of
26 employees, enforcing contract language that the union would “not accept for membership”
27 certain employees for the duration of the parties’ agreement. 63 NLRB at 1271-1272.

1 Subsequently, in *Cessna Aircraft Co.*, 123 NLRB 855, 856 (1959), the Board determined that the
2 *Briggs Indiana* rule applies “only where the contract itself contains an *express* promise on the
3 part of the union to refrain from seeking representation of the employees in question or to refrain
4 from accepting them into membership.”¹⁵ Then, in *Lexington Health Care Group, LLC d/b/a*
5 *Lexington House*, 328 NLRB 894 (1999), the Board clarified *Cessna Aircraft*, holding that the
6 promise to refrain from organizing must be express but need not be included in a contract to have
7 preclusive effect.¹⁶

8 Thus, the question is whether the Guild made an express promise in Paragraph D of the
9 NMA not to represent the Digital Journalists. Two of the three elements are not in much dispute.
10 First, there is no doubt that the Guild made a promise:

11 “[T]he Guild will not use this Agreement, work assignments, or products resulting from
12 this Agreement as a means to attempt to represent or claim jurisdiction over any unaffiliated
13 employee(s) from a non-Guild home department or sub-department through accretion, unit
14 clarification procedures or contract grievance procedures.” ER Exh. 1, p. 74 (¶ D).

15 Second, the Guild does not seriously contest that the promise was “express,” and the
16 DD&E found that Paragraph D of the NMA was an express promise. *See* DD&E at 6 (“given
17 that the language of the *express promise* contained in the NMA....”) (emphasis added).

18 By requiring an express promise, the Board simply meant that the promise must be in words and
19 not inferred from conduct. *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)
20 (“an agreement ‘implied in fact,’ founded upon a meeting of minds, which, although not
21 embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the
22 light of the surrounding circumstances, their tacit understanding”). *See also* Cornell Law School,

24 ¹⁵ *See also Women & Infants’ Hospital of Rhode Island*, 333 NLRB 479, 479 (2001) (applying *Cessna Aircraft, supra*,
25 to find that contractual language specifically excluding respiratory therapists from a technical employees unit did not
26 bar the union from petitioning for an *Armour-Globe* election in a unit of respiratory therapists as the union never made
27 an express promise not to seek to represent the respiratory therapists).

¹⁶ In *Lexington House*, the union promised, via side agreements, not to organize unrepresented employees at the
employer’s Lexington facilities in exchange for the employer’s neutrality during new organizing. When the union
sought to organize Lexington House, the Board held that the union was bound to its promise not to organize and
dismissed the petition. 328 NLRB at 896.

1 Legal Information Institute, https://www.law.cornell.edu/wex/express_contract (“An express
2 contract and a contract-implied-in-fact both require mutual assent and a meeting of the minds.
3 However, an express contract is proved by an actual agreement (either written or oral), and a
4 contract-implied-in-fact is proved by circumstances and the conduct of the parties.”);
5 Restatement (Second) of Contracts § 4 comment a (“Contracts are often spoken of as express or
6 implied. The distinction involves, however, no difference in legal effect, but lies merely in the
7 mode of manifesting assent. Just as assent may be manifested by words or other conduct,
8 sometimes including silence, so intention to make a promise may be manifested in language or
9 by implication from other circumstances, including course of dealing or usage of trade or course
10 of performance.”); *Budd Co.*, 154 NLRB 421, 423, fn. 3 (1965) (Board declined to infer a
11 promise not to organize from the unit exclusion in a consent-election agreement, the parties’
12 contract, and their strike-settlement agreement, noting that petition will not be barred “on the
13 basis of an *alleged understanding* of the parties during contract negotiations”) (emphasis added);
14 *Lexington House*, 328 NLRB at 896.

15 Here, The Times does not ask the Board to *infer* that the Guild has promised not to
16 represent the Digital Journalists. The promise occurs in a written CBA, and the proof of a
17 binding promise is the NMA itself. In fact, the Guild’s promise is even clearer than the union’s
18 was in *Briggs Indiana*—it explicitly agrees not to “attempt to represent” the Digital Journalists,
19 while the union in *Briggs Indiana* agreed not to accept certain employees to membership.
20 Further, similar to *Lexington House*, the Guild’s promise was part of a bargained-for exchange.

21 Since the Parties have reached an express agreement, *Briggs Indiana* and progeny
22 instruct the Board to hold them to their promises. This is of particular import as it is not “the
23 proper function of the ... Board to expend its energies and public funds” in connection with an
24 action that a union “agreed it would refrain ... from seeking to achieve.” *Briggs Indiana, supra*,
25 63 NLRB at 1273. And while the Guild “may have good reason to regret the original
26 commitment or decline hereafter to renew it,” i.e., a desire to attempt to represent the Digital
27 Journalists, “this Board should not take affirmative action to facilitate its avoidance [of the

1 NMA]. That is not the business of the Government of the United States.” *Id.* Consequently,
2 the Board should dismiss the RC Petition, “for a party ought to be bound by its promise.”
3 *Lexington House, supra*, 328 NLRB at 896. To do otherwise would permit the Guild “to take
4 advantage of the benefits accruing from its valid contract”—a contract that is the “result of
5 bargaining between equals”—“while avoiding its commitment by petitioning to the Board for
6 an election.” *Id.* at 897.¹⁷

7 In seeking to hold the Guild to its contractual obligation, The Times does not ask the
8 Board to infringe upon the Digital Journalists’ Section 7 rights. Rather, The Times merely seeks
9 to hold *the Guild* to its contractual obligations. The Board does not consider such a limitation to
10 be a restriction of Section 7 rights. *See, e.g., Briggs Indiana, supra*, 63 NLRB at 1272
11 (“the Board does not depart from the earlier view that rights guaranteed employees under the Act
12 cannot themselves be bargained away. Yet it remains true that the exercise of the right of given
13 employees to choose any representative they desire is never literally unrestricted; the field of
14 choice is necessarily limited by the number of labor organizations willing to undertake collective
15 bargaining on their behalf. These particular employees affiliated voluntarily with a union which
16 had previously imposed a similar limitation by agreeing not to make itself available to them for”
17 a defined period of time). The Board should not shy away from reversing the DD&E out of
18 concern for the Digital Journalists’ Section 7 rights.

19 The Board must also consider the Print Journalists’ rights. The Main Bargaining Unit has
20 repeatedly chosen, through ratification of successive CBAs with The Times that contained many
21 tradeoffs, not to include the Digital Journalists in their Unit. The Main Bargaining Unit also
22 insisted that the work of Digital Journalists for the print product be quite limited, limitations that
23 would disappear if the Digital Journalists were to become “affiliated.” The Guild has not
24

25 ¹⁷ The Board may wish to revisit cases like *Springfield Terrace LTD*, 355 NLRB 937 (2010), relied upon by the RD,
26 *see* DD&E 3, where a prior Board conflated the “express promise” standard with the “clear and unmistakable
27 waiver” standard. The Times reserves the right to further brief that particular issue should the Board grant review in
this matter but posits, in the interim, that normal contract interpretation rules would apply in conjunction with *Briggs
Indiana* and progeny. *See MV Transportation, Inc.*, 368 NLRB No. 66 (2019) (returning to “contract coverage”
standard).

1 recently signaled that its members’ position has wavered or changed, and for twenty years the
2 Guild has enjoyed the benefits of the NMA and not sought to terminate it. By permitting an
3 election among the Digital Journalists, propped up by organizing efforts based on these
4 employees’ cross-jurisdictional work assignments with Print Journalists, discussed below—the
5 Board would “negate the choice[s] expressed in the” NMA “and effectively elevate the Section 7
6 rights of the [Digital Journalists] over those of the” Main Bargaining Unit employees. *UMass*
7 *Memorial Medical Center*, 349 NLRB 369, 371 (2007) (Member Schaumber, dissenting).¹⁸
8 The Board should endeavor not to elevate either group of employees’ rights. It should instead
9 hold the Guild to its contractual obligation.

10 **2. The RD’s Interpretation of the NMA is Contrary to Its Terms and the**
11 **Parties’ Bargaining History**

12 The third—and key—element is whether the express promise made by the Guild in the
13 NMA bars the Petition. The Board has made clear that when required to interpret CBAs, the
14 “parties’ actual intent underlying the contractual language in question is always paramount.”
15 *Mining Specialists*, 314 NLRB 268, 268 (1994). To determine that intent, the Board uses
16 traditional labor contract interpretation principles, including the past practice of the parties, the
17 bargaining history of the provisions, and other relevant extrinsic evidence. *Id.* at 268-269;
18 *Daycon Products*, 360 NLRB 357 (2014) (consideration of bargaining history); *Kmart*
19 *Corporation*, 331 NLRB 362 (2000) (consideration of prior application of provision and
20 bargaining history); *APL Limited*, 2015 WL 2156793 (Division of Advice) (2015) (“The Board
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23 ¹⁸ In *UMass Memorial Medical Center*, 349 NLRB at 370, a Board majority found that the RD properly directed a
24 self-determination election among per diem EMTs, notwithstanding that the parties excluded these employees from
25 the unit of regular EMTs through their contract’s recognition clause. The Board explained that in ratifying their
26 contract, the unit employees “never expressly voted to preclude the per diem employees from joining the unit for the
27 duration of the contract’s term,” and the employer did not seek “an agreement from the [union] not to represent the
per diem employees during the contract’s term.... Absent any such agreement on the part of the [union], preventing
the petitioned-for employees from voting in a self-determination election would serve only to contravene the freedom
of self-organization that Section 7 is designed to protect.” As discussed herein, and contrary to *UMass Memorial*
Medical Center, the Main Bargaining Unit employees have continuously voted to preclude the Digital Journalists from
joining their Unit for the duration of their contract with The Times.

1 assesses whether a party’s contractual interpretation has a sound arguable basis by applying
2 traditional principles of contract interpretation.”)

3 The RD’s cursory discussion of Paragraph D of the NMA does not satisfy the Board’s
4 requirements for contract interpretation. The DD&E fails to give meaning to all terms of the
5 agreement, fails to recognize the standard meaning of specific terms, and ignores all extrinsic
6 evidence. These failures prejudice The Times and warrant reversal of the DD&E and dismissal
7 of the RC Petition.

8 Other than repeating the language of Paragraph D, the DD&E essentially makes only one
9 attempt at interpretation: that the “attempt to represent” term is in the same sentence as
10 “accretion, unit clarification, and contract grievance proceedings.” DD&E at 6 (“I find the
11 Employer’s argument that the ‘attempt to represent’ language justifies barring the instant petition
12 unpersuasive, as it clearly ignores the rest of the sentence limiting the restriction to accretion,
13 unit clarification, and contract grievance proceedings.”)

14 Obviously, The Times concedes that the “attempt to represent” phrase is in the same
15 sentence as “accretion, unit clarification, and contract grievance proceedings.” But the DD&E
16 overlooks that two different promises can be—and are—contained in the same sentence.
17 A simple examination of the specific language of Paragraph D reveals those two promises.
18 First, the Guild promised not to attempt to represent the Digital Journalists. Second, the Guild
19 promised not to claim jurisdiction through accretion, unit clarification, and contract grievance
20 proceedings. *See* ER Exh. 1, p. 74 (¶ D).

21 The structure of the sentence, the agreement as a whole, and the bargaining history
22 demonstrate that the parties intended two different promises. First, the phrases “attempt to
23 represent” and “claim jurisdiction ... through accretion, etc.” are separated by “or.” This
24 disjunctive term recognizes that the Parties were addressing two different possibilities. *Unite*
25 *Here Local 1 (Ritz-Carlton Water Tower Partnership)*, 358 NLRB 116, 124 (2012) (ALJD),
26 “The Union’s strained effort to interpret them as something else founders on the rock represented
27 by the parties use of a tiny but important additional disjunctive term, ‘or.’”); *Pacific Maritime*

1 *Association*, 367 NLRB No. 121 (2019), slip op. at 22 n. 26 (ALJD, “When interpreting a
2 contract, each item in a string of terms, separated by the disjunctive ‘or,’ is given independent
3 meaning.”); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (Improper to reach strained
4 construction by ignoring “the disjunctive ‘or’ ...[because] [c]anons of construction ordinarily
5 suggest that terms connected by a disjunctive be given separate meanings unless the context
6 dictates otherwise....”)

7 Second, these sophisticated Parties with a long relationship know that the independent
8 phrases signal two distinct mechanisms under the NLRA: (a) “attempt to represent”
9 contemplates employee free choice expressed through an NLRB representation election, e.g.,
10 a self-determination election; and (b) “claim jurisdiction ... through accretion, unit clarification
11 procedures or contract grievance procedures” facilitates a union’s response to workplace changes
12 that purportedly impact a bargaining unit and lead to *the Board’s or an arbitrator’s assignment*
13 of employees to a *preexisting unit’s choice* of bargaining representative by certain enumerated
14 mechanisms. In fact, the Board has expressly stated that “[a] self-determination election is
15 meaningfully distinct from an accretion following a unit clarification petition, as a
16 self-determination election affords the employees the opportunity to vote as to whether or not
17 they wish to be included in the existing unit.” *UMass Memorial Medical Center*, 349 NLRB
18 369, 370 (2007). *See also The Balt. Sun Co. v. NLRB*, 257 F.3d 419 (4th Cir. 2001) (“[b]ecause
19 the accretion doctrine is in considerable tension with the statute’s guarantee of employee
20 self-determination, the Board has historically favored employee elections, reserving accretion
21 orders for those rare cases in which it could conclude with great certainty, based on the
22 circumstances, that the employees’ rights of self-determination would not be thwarted”);
23 *Westinghouse Elec. Corp. v. NLRB*, 506 F.2d 668, 672-73 (4th Cir. 1974) (noting that the Board
24 may not, under the guise of accretion, deny employees an election to express their choice).
25 The processes in the second phrase—accretion, unit clarification and grievance procedures—are
26 used to expand the union’s jurisdiction absent a question concerning representation. Since these
27

1 terms are not conceptually relevant to “attempt to represent,” they cannot—and do not—modify
2 that phrase.

3 Third, the DD&E’s interpretation essentially deletes words in Paragraph D. If the Parties
4 had intended to limit Paragraph D’s scope only to accretion, unit clarification and grievance
5 procedures, there would be no need to include the phrase “attempt to represent.” Under the
6 DD&E’s rationale, the Guild’s promise would be the same with or without that phrase.
7 However, it is a basic canon of contractual interpretation—ignored by the DD&E—to provide
8 meaning to all terms. *See Gulf-Wandes Corp.*, 236 NLRB 810, 812 (1978) (“[a] contract is to be
9 interpreted to give meaning to all its provisions”); *Supreme Sunrise Food Exchange, Inc.*,
10 105 NLRB 918, 920 (1953); *Madison Industries, Inc.*, 349 NLRB 1306, 1310 (2007) (Liebman,
11 dissenting); Restatement (Second) of Contracts, sec. 203(a) (“an interpretation which gives a
12 reasonable ... and effective meaning to all the terms [of a contract] is preferred to an
13 interpretation which leaves a part unreasonable ... or of no effect.”) To give meaning to the
14 phrase “attempt to represent,” it must be interpreted to include different representational actions.

15 Fourth, the first sentence of Paragraph D cannot be read in isolation but rather must
16 consider the entire paragraph within which that sentence sits.¹⁹ To that end, the Parties
17 specifically distinguished the “attempt to represent” provision from the “claim jurisdiction ...
18 through accretion ...” provision. The second and third sentences of Paragraph D of the NMA,
19 which were added in 2013, are limited *only* to accretion, unit clarification, or contract grievances.
20 *See* ER Exh. 8, p. 2 (¶ D). They do not reference or include the “attempt to represent” prong of
21 the first sentence, demonstrating that the Parties view the concepts differently. The RD did not
22 consider this evidence.

23 Fifth, the text from another of the Parties’ Addenda further highlights that they
24 understood the conceptual distinction, and that the RD has misinterpreted the NMA. As does the

25 ¹⁹ *See generally Teamsters Indus. Emp. Welfare Fund v. Rolls-Royce*, 989 F.2d 132, 135 (3d Cir. 1993) (“Extrinsic
26 evidence may include the *structure of the contract*, the bargaining history, and the conduct of the parties that reflects
27 their understanding of the contract’s meaning. These basic principles of contract construction are not inconsistent
with federal labor policy.”) (emphasis added); 5 Corbin on Contracts § 24.21 (“[T]he intention of the parties is not
derived from sentences or clauses read in isolation, but from the instrument as a whole.”).

1 NMA, Addendum 11 to the CBA allows Main Bargaining Unit employees to perform non-unit
2 work, in this case, selling advertising in products outside the Guild’s jurisdiction. Unlike the
3 NMA, however, the Guild’s commitment is limited to an express promise not to use the
4 mechanisms contained only in the second part of the NMA promise: *accretion, unit clarification*
5 *or the grievance procedure*. See ER Exh. 1, p. 72 (¶ 3). If the Guild did not want to restrict its
6 ability to “attempt to represent” the Digital Journalists, it could easily have proposed the
7 language the Parties had already used in Addendum 11. It did not.

8 Sixth and finally, the RD’s blithe dismissal of the bargaining history underscores the
9 problems with the RD’s erroneous findings and interpretations. The DD&E first states that it is
10 “unnecessary to examine” the bargaining history. DD&E 6. Then, having not examined it, the
11 RD finds “nothing in the bargaining history” that undercuts his finding. This last comment
12 makes clear that any examination of the bargaining history was illusory, because the bargaining
13 history sheds a spotlight on the meaning of Paragraph D. It is incumbent on the Board to
14 recognize this bargaining history. *Daycon Products*, 360 NLRB 357 (2014) (consideration of
15 bargaining history); *Kmart Corporation*, 331 NLRB 362 (2000) (consideration of prior
16 application of provision and bargaining history).

17 During the 2000 negotiations, the Parties discussed The Times’ right to develop its digital
18 platform, the ability for Print and Digital Journalists to do cross-jurisdictional work, and the
19 Guild’s curtailed organizing—and reached accord on all matters. See ER Exh. 18 (¶ 4, 6-9).
20 And the evidence from those negotiations is undisputed: the intent of Paragraph D of the NMA
21 was to require the Guild to keep “hands off” the Digital Journalists. Chris Biencourt, who
22 negotiated the 2000-01 NMA, testified:

23 When we reached the [NMA], both parties agreed not to alter the current scope of
24 the Guild bargaining unit during the term of the agreement. Accordingly, the
25 [NMA] contained a provision which prohibited the Guild from seeking to
26 represent the [D]igital [J]ournalists. *The intent of this provision was, in return for*
27 *allowing the print journalists to work on the digital platforms, that the Guild*
would be “hands-off” the [D]igital [J]ournalists until the [NMA] expired.
This requirement is found in Paragraph D of the [NMA]: “The Guild will not use
this Agreement, work assignments, or products resulting from this Agreement as a
means to attempt to represent ... employee(s) from a non-Guild home

1 department” *We believed that, because of these limitations, the Guild would*
2 *not be able to represent the [D]igital [J]ournalists.*

3 ER Exh. 18 (¶ 8) (internal citation omitted) (emphasis added).

4 Likewise, Martin Hammond, who negotiated the changes incorporated in the 2013 NMA,
5 testified that the NMA:

6 [] was an agreement that was reached between the [P]arties to do a variety of
7 things. The digital world and digital communications were becoming a bigger
8 and bigger part of the way that we would reach our audience. And this agreement
9 provided for a way for the company to utilize [P]rint [J]ournalists and their work
10 in our digital products, without the Guild ever gaining jurisdiction over those
11 products. ... *It was a hands-off agreement, you know, is how I’ve always*
12 *interpreted, that the Guild would not represent people that were on the digital*
13 *product teams.*

14 Tr. 38:15-24 (emphasis added). The Guild produced no contrary evidence and did not even
15 challenge this testimony on cross-examination of Mr. Hammond. And by its ratification of the
16 current contract, the Guild recommitted to its “hands off” approach to the Digital Journalists,
17 *see* ER Exh. 18 (¶ 8); Tr. 38:22-24, 55:17-19, at least for two more contract terms.

18 Indeed, the specifics of the 2013 negotiations provide additional support. In those
19 negotiations, The Times sought a longer agreement so that if the NMA ever went away, it would
20 have time to disentangle the Digital Journalists from the print work and the Print Journalists from
21 the digital work. Tr. 56:12-20, 58:3-5. *See also* ER Exh. 8, p. 3.²⁰ At the Guild’s suggestion,
22 the Parties agreed that the NMA would last for the term of the current CBA and the term of the
23 next CBA. *Id.* Again, the Guild did not introduce any contrary evidence.

24 If the NMA permitted the Guild to attempt to represent the Digital Journalists at any time
25 during its term, there would be no value to this disentanglement period. *See* ER Exh. 8, p. 3.
26 Thus, the Times would not have bargained for such a dissolution procedure if not to preserve its
27 ability to keep the Guild from representing Digital Journalists. The Times’ emphasis on having a
28 long wind-down period makes sense only if the Parties know that the Guild cannot represent the
29 Digital Journalists, under any scenario, during the term of the NMA.

30 _____
31 ²⁰ Here too, the “hands off” understanding persists. Mr. Hammond testified that when negotiating the 2013
32 modifications, he proposed to extend the duration of the NMA to ten years as he “didn’t want to have to risk the
33 hands-off agreement expiring at the end of every CBA.” Tr. 55:15-19.

1 Rather than engage in a thorough analysis of the Parties' NMA, the RD merely scoffed at
2 The Times' argument that no "magic words" are necessary to hold a union to its contractual
3 promise not to represent certain employees. The Board cannot countenance giving short shrift to
4 a matter of such legal significance. Instead, the Board should reverse the DD&E for the reasons
5 articulated above and dismiss the RC Petition. The Guild's promise not "to attempt to represent"
6 the Digital Journalists easily fits within the contours of *Briggs Indiana* and progeny, and the
7 Guild must be held to the clear meaning of that express promise.

8 **B. The RD Erred by Failing to Find the NMA Constitutes an Express Promise**
9 **Not to Rely on Cross-Jurisdictional Work to Organize the Digital Journalists**
10 **and by Barring Evidence of Such Organizing Efforts**

11 Even assuming, *arguendo*, that the NMA cannot be read as a complete bar on the Guild's
12 Petition, the NMA contains the Guild's express promise not to use the Print and Digital
13 Journalists' cross-jurisdictional work assignments to attempt to represent the latter employees.
14 The Times made clear in its Statement of Position and several times during the hearing that it
15 contended that the NMA barred the Guild from relying on the cross-jurisdictional work to
16 organize the Digital Journalists. Tr. 84:8-15, 346:9-17. Yet the Hearing Officer barred The
17 Times from introducing a series of tweets by Digital Journalists promoting organizing based on
18 this collaborative work. *See* ER Exh. 11. The RD affirmed that ruling. *See* DD&E 6-7.
19 Rejection of The Times' Exhibit 11 is unduly prejudicial and constitutes grounds to reverse the
20 DD&E and dismiss the instant RC Petition. *See* 29 C.F.R. § 102.67(d)(3).

21 The NMA states that the Guild "*will not use this Agreement, work assignments, or*
22 *products resulting from this Agreement as a means to attempt to represent or claim jurisdiction*
23 *over any unaffiliated employee(s) from a non-Guild home department or sub-department through*
24 *accretion, unit clarification procedures or contract grievance procedures.*" *See* ER Exh. 1, p. 74
25 (¶ D, emphasis added). As a practical matter, the Guild cannot seek to represent the Digital
26 Journalists without using the assignments contemplated by the NMA. Thus, this prohibition was
27 understood to mean that the Guild would be completely "hands off" with the Digital Journalists
until the NMA expired. *See* Tr. 38:22-24, 55:17-19; ER Exh. 18 (¶ 8).

1 Despite its commitment, the Guild is actively relying on the cross-jurisdictional work
2 assignments to represent the Digital Journalists. For example, the Guild published a Mission
3 Statement to accompany the RC Petition that states: “We [the Digital Journalists], work side by
4 side—and often interchangeably—with reporters, copy editors, photographers, desk editors,
5 graphic artists and others who have a voice in our workplace, while we do not.” *See, e.g.*,
6 ER Exh. 10. It is clear from this Mission Statement that the Guild’s organizing effort turns on
7 the cross-jurisdictional work assignments done by the Print and Digital Journalists—the Guild is
8 essentially asserting that Digital Journalists’ ability to do print work is grounds for their inclusion
9 in the Main Bargaining Unit. The Guild’s reliance on these assignments to organize the Digital
10 Journalists thus taints its Petition, since such reliance is directly contrary to its
11 collective-bargained promise in the NMA and supports the RD’s dismissal of the RC Petition.

12 On this point, The Times sought to introduce further evidence at the hearing that the RC
13 Petition is tainted. Specifically, The Times sought to introduce Exhibit 11—tweets that took the
14 Guild’s violative cross-jurisdictional organizing efforts online through its own and the Seattle
15 Times Digital Union’s social media profiles. For example, both groups are actively using the
16 “#OneNewsroomOneUnion” hashtag to emphasize the cross-jurisdictional work completed by
17 Print and Digital Journalists and have posted various messages perpetuating its reliance on these
18 work assignments. This content includes a May 26 tweet from the Seattle Times Digital Union:
19 “We are producers, video journalists, news developers and engagement editors. We work side
20 by side – and often interchangeably – with reporters, copy editors, photographers, desk editors,
21 graphic artists and others who have a voice in our workplace, while we do not.” The Guild
22 similarly tweeted on May 26: “Day after day, @SeaTimesFotoKen and the ENTIRE
23 @seattletimes newsroom staff does outstanding work – and they do it together. The [sic] belong
24 in the Guild together as well! #OneNewsroomOneUnion[.]” *Id.* (emphasis added). As with the
25 Guild’s Mission Statement, *see* ER Exh. 10, these tweets similarly serve to show that the RC
26 Petition is tainted by the Guild’s reliance on the cross-jurisdictional work completed by the Print
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1 and Digital Journalists to organize the latter employees. The Hearing Officer excluded
2 Exhibit 11 and placed it in the Rejected Exhibits file. Tr. 82:7-13, 355:7-15.

3 In affirming the Hearing Officer’s evidentiary rulings, the RD found that The Times’
4 Exhibit 11 has no bearing on whether the NMA contains an express promise to refrain from
5 representing the Digital Journalists. DD&E 7. The RD errs here. These tweets directly
6 demonstrate that the Petition is founded upon a contractual violation. The tweets showcase the
7 precise reality that the Parties contemplated and sought to avoid in negotiating the NMA—the
8 Guild’s reliance on the relationship between the Print and Digital Journalists as a means to
9 organize the latter employees.

10 Bargaining history is again relevant yet disregarded by the RD. For example, in 2013,
11 the Parties modified the NMA to reflect the collaboration that was happening between the Print
12 and Digital Journalists in The Times’ News Department. Inasmuch as The Times’ “digital
13 products went from being part of a separate function in a separate department, a new media
14 department,” to a more integrated model, Tr. 39:13-16, the NMA went away from being a
15 department-based document. *Id.* at 39:11-23. Instead, its language was modified to recognize
16 that the NMA had done its job: allowed and encouraged collaboration between the Digital
17 Journalists and the Print Journalists. Having agreed to such collaboration, the Guild cannot now
18 use the collaboration to organize the Digital Journalists. Moreover, the scope of the Guild’s
19 promise is also revealed by the 2013 amendments that allow The Times to assign Main
20 Bargaining Unit work to Digital Journalists, but only in a limited amount. If The Times and the
21 Guild intended to allow the Guild to use the cross-jurisdictional collaboration in *any* kind of
22 proceeding, including for organizing, The Times would not have agreed to limitations on the
23 amount of that work.

24 The Hearing Officer’s failure to permit introduction of ER Exh. 11 and the RD’s failure
25 to consider this evidence that the Guild is violating the NMA will unduly prejudice The Times.
26 And since the Guild’s RC Petition is completely contaminated by its impermissible reliance on
27

1 cross-jurisdictional work assignments to attempt to represent the Digital Journalists, the Board
2 must reverse the DD&E and dismiss the Petition.

3 **V. CONCLUSION**

4 As discussed throughout, the Guild has made an express promise not to attempt to
5 represent The Times' Digital Journalists in the NMA, including by promising not to use
6 cross-jurisdictional work assignments to attempt to represent these employees. In direct
7 contravention of that promise, the Guild seeks to represent these unaffiliated journalists.
8 The Board should grant review in this matter, reverse the DD&E, and dismiss the RC Petition,
9 thereby holding the Guild to its bargained-for promise with The Times.

10 DATED this 28th day of August, 2020.

11
12 Davis Wright Tremaine LLP
13 Attorneys for The Seattle Times Company

14 By 
15 _____
16 Henry E. Farber
17 Nicole Mormilo

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4 **UNITED STATES OF AMERICA**
5 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

6 SEATTLE TIMES COMPANY,)
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8 Employer,)
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CASE NO: 19-RC-261015
CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served via the method(s) listed below a copy of the foregoing SEATTLE TIMES COMPANY’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION, upon the following:

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 Second Avenue, Suite 2948
Seattle, WA 98174-1078
Via Email: Ronald.Hooks@nlrb.gov

Rachel Cherem, Field Attorney
National Labor Relations Board, Region 19
915 Second Ave., Suite 2948
Seattle, WA 98174-1078
Via Email: Rachel.Cherm@nlrb.gov

Dmitri Iglitzen
Barnard Iglitzin & Lavitt LLP
18 W. Mercer Street, Suite 400
Seattle, WA 98119
Via Email: iglitzin@workerlaw.com

1 Melissa Greenberg
2 Barnard Iglitzin & Lavitt LLP
3 18 W. Mercer Street, Suite 400
4 Seattle, WA 98119
5 **Via Email:** greenberg@workerlaw.com

6 DATED this 28th day of August, 2020.

7 *Claire D. Tollfeldt*

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9 Claire D. Tollfeldt
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